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March 25, 2011

In re Merck & Co., Inc., Securities, Derivative & "ERISA" Litigation (MDL 1658)
Nos. 05-CV-01151-SRC-MAS & 05-CV-02367-SRC-MAS
The Consolidated Securities Action

Dear Judge Chesler:

We respectfully submit this letter on behalf of all Defendants[1] in response to Plaintiffs' letter, dated March 23, 2011, regarding the Supreme Court's recent decision in *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156, 2011 WL 977060, 563 U.S. __ (Mar. 22, 2011).

The decision in *Matrixx* has very limited relevance to the issues in this misstatement of opinion case. As set forth in Defendants' motion to dismiss, Plaintiffs allege that Defendants made false and misleading statements of *opinion* regarding their belief in the naproxen hypothesis (*see* Mem. 1-3, 49-50; Reply 3-6), having abandoned on appeal any allegations of misstatements of *fact* concerning the safety profile of Vioxx (*see* Mem. 49-50; Reply 3-8).[2] As such, the Supreme Court's decision in *Matrixx*, which concerns alleged misstatements of fact, has no bearing on the central issue in Defendants' motion: whether

[1] Defendant Dr. Edward M. Scolnick, who is separately represented and filed his own motion to dismiss, joins in this letter.

[2] Citations to "Mem." and "Reply" refer to the Memorandum Of Law In Support Of Defendants' Motion To Dismiss The Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 254 Attach. 1) and the Reply Memorandum Of Law In Support Of Defendants' Motion To Dismiss The Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 264), respectively.

Plaintiffs have pleaded adequately that Defendants actually disbelieved the naproxen hypothesis at the time they endorsed it.

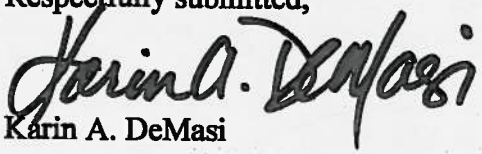
Nor does *Matrixx* undermine Defendants' motions with respect to scienter or materiality. *First*, *Matrixx* does not impact Defendants' arguments regarding scienter. In *Matrixx*, the Supreme Court merely rejected the argument that there must be "an allegation of statistical significance to establish a strong inference of scienter." *Matrixx*, 2011 WL 977060, at *13. Defendants in this case do not make such an argument. Moreover, the "deliberate recklessness" standard for scienter that the Supreme Court "assume[d]" in *Matrixx*, *id.* at *13,[3] does not apply in a misstatement of opinion case such as this. Instead, Plaintiffs here must plead facts sufficient to support a strong inference that each Defendant *actually disbelieved* the naproxen hypothesis at the time Merck publicly endorsed it. (*See* Mem. 32-34; Reply 30-32.) *Matrixx* does not address this higher, "actual disbelief" standard required in a statement of opinion case. (*See* Mem. 30-33; Reply 30-32.) Accordingly, *Matrixx* does not help Plaintiffs meet their burden of establishing a strong inference that each Defendant acted with scienter.

Second, Defendants likewise do not argue that alleged misstatements of belief regarding the naproxen hypothesis were immaterial. Thus, *Matrixx* is of no help to Plaintiffs with respect to those claims. Moreover, to the extent Plaintiffs are not estopped (as they should be) from pursuing alleged misstatements of fact regarding the cardiovascular safety profile of Vioxx, *Matrixx* does not affect Defendants' primary argument that such alleged misstatements could not be material to investors as a matter of law because Defendants' repeated disclosures, as well as ample coverage in the medical, scientific and lay press, made investors well aware that Vioxx's safety profile included the potential for increased cardiovascular risk. (*See* Mem. 51-55; Reply 40-43.) As a result, any alleged misstatements regarding the cardiovascular safety profile of Vioxx could not have altered the "total mix" of information available to investors. To the extent that *Matrixx* overruled the holding in *Oran v. Stafford*, 226 F.3d 275, 284 (3d Cir. 2000), that adverse events are only material when the

[3] As the Supreme Court stated: "We have not decided whether recklessness suffices to fulfill the scienter requirement. Because Matrixx does not challenge the Court of Appeals' holding that the scienter requirement may be satisfied by a showing of 'deliberate recklessness,' we assume, without deciding, that the standard applied by the Court of Appeals is sufficient to establish scienter." 2011 WL 977060, at *13 (citations omitted).

data provide statistically significant evidence, *see Matrixx*, 2011 WL 977060, at *11, Defendants respectfully withdraw that additional argument. (*See* Mem. 55-57; Reply 43-45.)

Respectfully submitted,



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